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No. [redacted], ORIGINAL. [redacted] 9976

In the Supreme Court

of the United States

OCTOBER TERM, 1928.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants.*

MOTION FOR LEAVE TO INTRODUCE THE EVIDENCE OF A. J. ABBOTT AND JAMES CRAIG, TAKEN IN A PRIOR CASE.

ROLAND BOYNTON,
JOHN G. EGAN,
CHESTER I. LONG,
Solicitors for the State of Kansas.

F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for the Finney County Water Users' Association, a Corporation.

13-8168

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No. 13, ORIGINAL.

THE STATE OF COLORADO, *Complainant*,

vs.

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants.*

MOTION FOR LEAVE TO INTRODUCE THE EVIDENCE OF A. J. ABBOTT AND JAMES CRAIG, TAKEN IN A PRIOR CASE.

Come now, the defendants above named and show to the court:

I.

That one of the objects sought in the complainant's bill of complaint is to prohibit and enjoin the further prosecution of a certain action pending in the United States district court for the district of Colorado in which the defendant the Finney County Water Users' Association is plaintiff, and the Graham Ditch Company *et al.* are defendants, the said defendants being irrigators taking water in Colorado from the Arkansas river and its tributaries. That the said case is at issue, and a large volume of evidence has been taken in the said cause bearing upon the issues of whether Colorado has a right to take all of the water in the Arkansas river and whether the said Finney County Water Users' Association can assert and maintain its claimed priority or diversion from the Arkansas river as against the Colorado irrigators. That the same

issues are raised and involved here in the plaintiff's bill and the counterclaim of the state of Kansas, and the said Finney County Water Users' Association.

II.

That a large amount of testimony was taken by the Finney County Water Users' Association in the above-mentioned case, and among others the evidence of Hon. A. J. Abbott, who was formerly judge of the district court of the district in which the Kansas irrigation ditches are situated. Judge Abbott testified as to early-day irrigation in Kansas, the supply of water, its depletion, and particularly as to the facts regarding the knowledge of Kansas irrigators of their rights, and that these irrigators were doubtful and uncertain as to whether they could maintain their priority of irrigation as against the Colorado irrigators, and the fact that they were advised by what they deemed competent authorities that they could not. This particular evidence will go to the question of laches on the part of the Kansas irrigators. The deposition of Judge Abbott was taken at Santa Fe, N. Mex., on the 17th day of February, 1923. That the Hon. Fred A. Sabin, of Pueblo, Colo., who is now counsel for the complainant in this case, was counsel for the defendants in the above-mentioned case, appeared and cross-examined Judge Abbott. That Judge Abbott died three years ago and there is no living witness who can testify to all of the facts which were particularly within Judge Abbott's knowledge and recollection.

III.

That at the hearing in this case at Garden City, Kan., on the 29th day of September, 1930, the defendants then taking testimony on their behalf, at which hearing the Hon. Fred A. Sabin appeared as counsel for the complainant, these defendants offered a copy of the deposition of Judge Abbott so as aforesaid taken, together with

proof of his death, and at the same time offered to admit any part or all of Mr. Sabin's cross-examination of Judge Abbott as part of the record in this case, to which offer the complainant by its counsel objected. That the evidence is being taken by stenographic commissioner, who is without authority to rule upon said objection, and these defendants now desire a ruling of this court upon the admissibility of this testimony into this record before they close the taking of their evidence.

That the bill of complaint in this case is in effect brought on behalf of the same parties who were defendants in the above-mentioned case. That they can suffer no injury by the admission of Judge Abbott's testimony in this case as they have had a full opportunity to cross-examine him. That the Finney County Water Users' Association closed its testimony in 1926. That the defendants therein delayed nearly two years, without taking any testimony, on the plea that they were preparing to file the bill of complaint herein. That this delay, and the necessary delay of this case, has deprived these defendants of Judge Abbott's testimony, and their rights will be seriously and injuriously affected if they are deprived of the use of this deposition in the present case; and these defendants respectfully move and request a ruling and order of this court upon the admission of Judge Abbott's deposition, and the objection of the complainant thereto; that the said objection be overruled, and the evidence of Judge Abbott be admitted into this record with the same force and effect and subject to the same objections as though herein taken.

IV.

These defendants further show to the court that one James Craig was a material and important witness for the Finney County Water Users' Association in its suit against the Graham Ditch Company

et al., and his deposition was duly taken in the said cause at Los Angeles, Cal., on the 12th day of February, 1923; that at the taking of the said deposition the Hon. Fred A. Sabin appeared as counsel for the defendants therein and cross-examined the said Craig, in the case of the *Finney County Water Users' Association v. The Graham Ditch Company et al.* That the said James Craig superintended the construction of the Finney County Water Users' irrigation ditch, beginning in 1880, and had charge of it for some years. He is the only living witness that can testify as to the exact date of the commencement of construction of said ditch, its completion, the date the water was put to beneficial use, the termination and general character of the ditch, and the volume it could carry and did carry at that time. That the said James Craig has testified in these various controversies between Colorado and Kansas several times. He resides at Gridley, Cal., and is now 78 or 79 years old. That he has refused, on account of his health, to testify in this case. That if the defendant, the Finney County Water Users' Association, is deprived of his testimony it will be very injurious to the rights of the said defendant, and the admission of said testimony will be of no possible injury to the complainant as the most of the Colorado parties affected by this litigation were the defendants in the case of *Finney County Water Users' Association v. The Graham Ditch Company* and had full opportunity to cross-examine. That the defendants offered the deposition of the said James Craig so aforesaid taken at Los Angeles, Cal., at the taking of the defendant's testimony in Garden City, Kan., on the 30th day of September, 1930. That counsel for the complainant, Hon. Fred A. Sabin, who appeared at the said taking on behalf of the complainant, objected to the admission of said deposition.

That the defendants offered only the first twenty-five pages of the said deposition, which covers and is confined to the facts above set forth. That the defendants offered to place in the record, if desired by complainant, all of the said Craig's testimony, including any and all parts of the cross-examination, which offer was refused. That unless this deposition is admitted to the record in this case, and the objection of the complainant overruled, it will be necessary to attempt to take the testimony of the said James Craig, involving the necessity of counsel for the complainant, these defendants and the state of Kansas, to travel 1,500 miles, at an expense of many hundreds of dollars, to procure and bring into the record exactly the same evidence which is now offered in this deposition, and with the same opportunity for Mr. Sabin to cross-examine them he has already had in the taking of said deposition. That it would require a compulsory process of this court to compel the said James Craig to testify, and that it is extremely doubtful, considering his advanced age and state of his health, whether he could give his testimony without serious detriment to his health.

These defendants respectfully request a ruling and order of this court upon the profert of the testimony of the said James Craig and the objection of the complainant thereto, that the said objection be overruled, and the said testimony of James Craig be admitted and placed in the record in this case with the same force and effect as though taken herein, subject to the same objections as could be made if so taken.

That the defendants have deposited with the clerk of this court the transcript of the testimony of Judge Abbott offered at Garden City, which will be found on page 921 of said transcript, and also the transcript of the evidence of James Craig offered at Garden City, which will be found on page 1,148 of said transcript, for the

examination of the court, if it desire to substantiate the facts set forth in this motion.

All of which is respectfully submitted,

ROLAND BOYNTON,
JOHN G. EGAN,
CHESTER I. LONG,
Solicitors for the State of Kansas.

F. DUMONT SMITH,
LAWRENCE LEWIS,
CHESTER I. LONG,
Solicitors for the Finney County Water Users' Association, a Corporation.

(Original verified)